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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW ALBERT RIVERA,

Defendant and Appellant.

D061595

(Super. Ct. No. SCD235654)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

A jury found Matthew Albert Rivera guilty of burglary (Pen. Code, § 459;<sup>1</sup> count 1) and petty theft (§ 484; count 2). Rivera admitted three prior prison terms (§ 667.5, subd. (b)), one strike (§ 667, subds. (b)-(i)) and, as to count 2, prior theft convictions

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

(§ 666). The court stayed one of the prison priors<sup>2</sup> and sentenced Rivera to four years eight months in prison: two years eight months (twice the lower term) on count 1; a stayed term (§ 654) on count 2; and one year for each of the two remaining prison priors. The court imposed fines and fees, including a \$154 criminal justice administration fee (also called a booking fee) (Gov. Code, § 29550.1) and a \$38 theft fine including a penalty assessment (§ 1202.5). Rivera appeals, contending imposition of the booking fee denied him equal protection because Government Code section 29550.1, unlike Government Code section 29550, does not require a finding of ability to pay. He also contends there was insufficient evidence of his ability to pay the theft fine. We affirm.

Rivera did not challenge the Government Code section 29550.1 booking fee in the court below on equal protection grounds or on any other grounds. There is a split of authority concerning forfeiture of issues regarding fines and fees. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392 [no forfeiture]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [forfeiture; Gov. Code, § 29550.2 booking fee]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 [forfeiture; restitution fine].) The California Supreme Court is reviewing the issue. (*People McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) Assuming without deciding there was no forfeiture

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<sup>2</sup> The reporter's transcript reflects a stay of sentence on this prison prior. The court did not have the authority to order a stay; it was required to impose and execute a one-year sentence or dismiss the enhancement. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) It is apparent from the record that had the court been aware of its options, it would have dismissed the prison prior rather than imposing and executing sentence. The abstract of judgment correctly reflects sentence for only two of the prison priors.

and equal protection requires this court to imply an ability to pay requirement, there was sufficient evidence of ability to pay. Forty-three-year-old Rivera was living on the streets when he was arrested, having been paroled three weeks earlier, and was "doing side jobs." His employment history was sporadic and the majority of his work experience was in construction. He owed an unspecified amount of child support and had no other debts and no assets. He dropped out of high school, but was "close to" a community college degree. He has a diagnosis of paranoid schizophrenia and bipolar disease. Presumably he will have prison wages; he did not make a contrary claim. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1486-1487.)

A similar analysis applies to the theft fine. Rivera did not object to that fine in the trial court. Section 1202.5 expressly requires an ability to pay. Such a finding can be implied. (See *People v. Phillips* (1994) 25 Cal.App.4th 62, 71 [probation costs]; *People v. Staley* (1992) 10 Cal.App.4th 782, 785 [drug program fee].)

#### DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.